

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF PUERTO RICO

3                   ANTILLES CEMENT CORP.,

4                   Plaintiff,

5                   v.

CIVIL NO. 06-1567 (RLA)

6                   AALBORG PORTLAND A/S,

7                   Defendant.

8                   **ORDER DISMISSING THE COMPLAINT**  
9                   **BASED ON FORUM SELECTION CLAUSE**

10                  Plaintiff, ANTILLES CEMENT CORP. ("ANTILLES"), instituted this  
11 suit under the Puerto Rico Dealer's Act of June 24, 1964, P.R. Laws  
12 Ann. tit. 10, §§ 278-278d (1997) (commonly known as "Law 75")  
13 alleging that defendant, AALBORG PORTLAND A/S ("AALBORG"), impaired  
14 and eventually terminated the existing contract between them without  
15 just cause. Plaintiff seeks damages as provided for in the Dealer's  
16 Act.

17                  This action was initially brought in the Puerto Rico local court  
18 and subsequently removed to this forum. Defendant has petitioned  
19 dismissal of the complaint pursuant to the terms of the forum  
20 selection clause contained in the parties' contract which designated  
21 the courts of England to dispose of the controversies arising  
22 thereunder. ANTILLES opposed the request arguing that the commercial  
23 relationship between the parties is covered by Law 75 and that under  
24 the circumstances present in this case the aforementioned clause  
25 should be disregarded.

26

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2 The Court having reviewed the arguments as well as the evidence  
3 submitted in the respective motions hereby finds that enforcement of  
4 the parties' choice of forum is warranted.<sup>1</sup>  
5

6 **BACKGROUND**

7 ANTILLES contracted with AALBORG for the purchase of certain  
8 quantities of grey Portland Cement in bulk to be dispatched from  
9 defendant's production plant in Denmark. The agreement specified the  
10 amount of cement to be sold and shipped to Puerto Rico by defendant  
11 on a monthly basis. The merchandise was to be loaded onto vessels  
12 chartered by plaintiff and destined for discharge in San Juan, Puerto  
13 Rico. ANTILLES contracted a shipping company for the transportation  
14 of the product to Puerto Rico based on a minimum tonnage per trip  
15 with built-in penalties in the event that the cargo did not reach the  
16 amount of weight agreed upon.

17 The contract with AALBORG became effective in January 2000 and  
18 was expected to last through December 2006. However, the termination  
19 date was subsequently moved forward to December 2005.

20 After having executed two contracts with forum selection clauses  
21 mandating arbitration in England the parties to this action signed an  
22 Addendum providing that contractual differences would be solved by  
23 English courts. The pertinent clause reads as follows: "Any conflicts  
24 arising out of or in connection with [the] Contract... which shall

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25 <sup>1</sup> Given our ruling, there is no need to address the controversy  
26 regarding the applicability of Law 75 to generic products raised in  
this case.

1 **CIVIL NO. 06-1567 (RLA)**2 **Page 3**3 not be settled amicably, shall be finally settled by the courts of  
4 England."5 Commencing September 2005, AALBORG failed to meet the agreed-  
6 upon product quotas. In October 2005, defendant notified ANTILLES  
7 that it could not comply with the quantities of cement previously  
8 contracted purportedly because of a machinery breakdown.<sup>2</sup> As a result  
9 thereof, plaintiff claims it was forced to pay a \$104,000.00 penalty  
10 to the shipper as well as expend in excess of \$745,000.00 in  
11 purchasing cement from other sources in order to meet its clients'  
12 demands.13 The following summarizes the quantities of cement (in metric  
14 tons) that AALBORG was required to sell pursuant to the contract  
15 terms versus those actually shipped; the applicable penalties  
16 triggered by the deficiency as well as the claimed added cement costs  
17 paid by ANTILLES to other suppliers:

<b>Date</b>	<b>Contract</b>	<b>Shipped</b>	<b>Penalty</b>	<b>Bought</b>	<b>Added Price</b>
9/05	21,000	16,000	\$104,000.00		
10/05	0			25,000	\$312,000.00
11/05	42,000			26,250	\$328,125.00
12/05	42,000			8,474	\$105,452.00

23  
24 <sup>2</sup> ANTILLES disputes defendant's alleged unforeseeable inability  
25 to comply. In support thereof, it points to AALBORG's "Quarterly  
26 Report on Operations at December 31, 2005", which indicated that  
defendant "operated regularly throughout the year, in line with that  
programmed" and that during the last three months of the year "the  
cement sector at Aalborg Portland recorded a slight improvement."

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2  
3 **FORUM SELECTION CLAUSE**  
45 Motions to dismiss based on forum selection clauses are  
6 considered under Rule 12(b) (6) Fed. R. Civ. P. for failure to state  
7 a claim. Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385, 387  
(1<sup>st</sup> Cir. 2001).8 Parties to a contract frequently select in advance a particular  
9 location for adjudication of any disputes that may subsequently arise  
10 in their relationship. Their choice of forum, however, is not  
11 conclusive. Depending on the particular circumstances at hand,  
12 enforcement of a forum selection clause will be evaluated either  
13 under the standards developed under M/S Bremen v. Zapata Off-Shore  
14 Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)<sup>3</sup> or under the  
15 transfer of venue provisions of 28 U.S.C. § 1404(a).<sup>4</sup>16 In cases where the parties' choice of forum lies in a foreign  
17 jurisdiction or in a state court, implementation of the contractual18  
19 <sup>3</sup> In Unisys Puerto Rico, Inc. v. Ramallo Bros. Printing, Inc.,  
20 128 D.P.R. 842, 857 (1991) the Puerto Rico Supreme Court, borrowing  
21 from Bremen, adopted the following criteria for validating forum  
22 selection clauses: (1) whether the selected forum is unreasonable or  
unfair; (2) trying the case in the selected forum would result in a  
clear and patent inequity or unreasonable or unfair; (3) the clause  
was negotiated through fraud or deceit and (4) implementing it would  
defeat the state's public policy.23 <sup>4</sup> 28 U.S.C. § 1404(a) reads:24 For the convenience of the parties and  
25 witnesses, in the interest of justice, a  
district court may transfer any civil action to  
any other district or division where it might  
26 have been brought.

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2 preferences will be guided by the criteria set forth in Bremen. On  
3 the other hand, in situations where transfer to another federal  
4 jurisdiction is viable, the proper remedy is not dismissal of the  
5 complaint but rather a determination of whether transfer is proper by  
6 focusing instead on the requirements established in § 1404(a).  
7 Stewart Org., Inc. v. Richoh Corp., 487 U.S. 22, 108 S.Ct. 2239, 101  
8 L.Ed.2d (1988).

9 Pursuant to Stewart, regardless of how a defendant may phrase  
10 its request, the court must apply the § 1404(a) factors if the forum  
11 selection clause allows venue in another federal court. Under this  
12 approach, the court must consider issues of convenience and fairness  
13 in addition to the parties' choice of forum.

14 Bremen, on the other hand, mandates that the courts apply the  
15 parties' choice of forum provided it is reasonable. "[T]he forum  
16 clause should control absent a strong showing that it should be set  
17 aside." 407 U.S. at 12-13. "The prevailing view towards contractual  
18 forum-selection clause is that 'such clauses are *prima facie* valid  
19 and should be enforced unless enforcement is shown by the resisting  
20 party to be unreasonable under the circumstances.'" Silva, 239 F.3d  
21 at 386 (citing Bremen, 407 U.S. 1, 10); In re Mercurio, 402 F.3d 62,  
22 64 (1<sup>st</sup> Cir. 2005); Outek Caribbean Distrib., Inc. v. Echo, Inc., 206  
23 F.Supp.2d 263, 267 (D.P.R. 2002).

24 The forum clause should be enforced "unless [the opposing party]  
25 could clearly show that enforcement would be unreasonable and unjust,  
26

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2 or that the clause was invalid for such reasons as fraud or  
3 overreaching." Bremen, 407 U.S. at 15. Additionally, "[a] contractual  
4 choice-of-forum clause should be held unenforceable if enforcement  
5 would contravene a strong public policy of the forum in which suit is  
6 brought, whether declared by statute or by judicial decision." *Id.*  
7

8 Disregarding the parties' choice of forum is reserved for those  
9 extreme situations where the evidence shows that not only will it be  
10 "gravely difficult and inconvenient" to face trial thereat but also  
11 "that he will for all practical purposes be deprived of his day in  
12 court." Bremen, 407 U.S. at 17-18. See also, Royal Bed and Spring  
13 Co., Inc. v. Famossul Industria e Comercio, 906 F.2d 45, 49 (1<sup>st</sup> Cir.  
14 1990) (inconvenience not enough; must deprive of day in court).

15 "There are compelling reasons why a freely negotiated private  
16 international agreement, unaffected by fraud, undue influence, or  
17 overweening bargaining power... should be given full effect." Bremen,  
18 407 U.S. at 12-13. "Mere inequality of bargaining power between two  
19 sides will not be enough to render a contract unenforceable." Outek,  
20 206 F.Supp.2d at 267. "A contract may be unenforceable due to unequal  
21 bargaining power if the party challenging the contract has been the  
22 victim of fraud or overreaching; if the party was coerced into  
23 signing; if it was denied the opportunity to seek legal advice prior  
24 to entering into the agreement; or if the contract is somehow  
25 unconscionable." *Id.* at 268.  
26

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The fact that another location would prove more convenient to the party resisting the agreed upon location is not sufficient to meet the "heavy burden" required to obviate a forum selection clause. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

Were it otherwise, forum selection clauses would almost never be enforceable, for inconvenience to at least one of the parties is an almost forgone conclusion when dealing with a provision that requires litigating away from one's home turf. Yet these clauses are standard fare in today's multi-jurisdictional and international contractual relationships. At the time these contracts are entered into, the parties routinely, voluntarily, and knowingly agree to litigate and/or be bound by the decision of forums located in distant locations. Thus, something considerably more than the mere inconvenience of traveling to litigate in a different, even faraway foreign jurisdiction, is required to overcome a contractual agreement to do so.

In re Mercurio, 402 F.3d at 66.

"While a plaintiff's choice of forum is ordinarily given deference by the court, this deference is inappropriate when the

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2 parties have entered into a contract providing for a different  
3 forum." Outek, 206 F.Supp.2d at 266. The burden falls upon the party  
4 opposing the forum selection clause to show why it should not be  
5 enforced. Famossul, 906 F.3d at 49; Outek, 206 F.Supp.2d at 267.

6 **PLAINTIFF'S ARGUMENTS**

7 ANTILLES does not contest that the controversies set forth in  
8 the complaint fall within the contracted choice of forum provision.  
9 Further, the clause is clearly written in mandatory terms. See,  
10 Silva, 239 F.3d at 388 (court to examine "whether language of the  
11 forum-selection clause is permissive or mandatory."). Additionally,  
12 there is nothing in the record suggesting that this condition was not  
13 freely negotiated between the parties. Plaintiff has not alleged that  
14 it was fraudulently induced into selecting a foreign country to  
15 resolve the contractual disputes.

16 Plaintiff argues that Puerto Rico public policy as set forth in  
17 Law 75 precludes enforcement of the choice of forum clause. The  
18 Dealer's Act specifically precludes agreements to litigate claims  
19 arising thereunder in jurisdictions outside of Puerto Rico. In  
20 pertinent part, Law 75 reads:

21 Any stipulation that obligates a dealer to  
22 adjust, arbitrate or litigate any controversy  
23 that comes up regarding his dealer's contract  
24 outside of Puerto, or under foreign law or rule  
25 of law, shall be likewise considered as

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violating the public policy set forth by this chapter and is therefore null and void.

P.R. Laws Ann. tit. 10, § 278b-2.

Assuming Law 75 applies to the relationship between the parties to this case, the aforementioned policy has yielded to clauses covered by the Federal Arbitration Act,<sup>5</sup> 9 U.S.C. §§ 1-16, as well as those falling within the ambit of § 1404(a).<sup>6</sup> Additionally, cases decided under Bremen have similarly bypassed the Law 75 forum limitations while applying federal common law.

In Famossul, *supra*, the court upheld a contract clause selecting Brazil as the chosen forum in a breach of Law 75 case. In Stereo Gema, after careful analysis, the court found that it is federal common law which determines whether or not the choice of forum provision - in that case the local court in California - would be enforced. The court ruled that the provisions of § 278b-2 were not conclusive and the case was dismissed after considering the Bremen factors.

In support of its objection to the English courts, plaintiff cites its out of pocket expenses of over \$800,000.00 from September through December 2005 caused by defendant's alleged breach which it claims have significantly impacted on its finances. ANTILLES argues

<sup>5</sup> Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626, 105 S.Ct. 2246, 87 L.Ed.2d 444 (1985); World Films v. Paramount Pictures Corp., 125 D.P.R. 352 (1990).

<sup>6</sup> Stewart.

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2 that it "should not be forced to further tax its resources by  
3 litigating in another country... [when] all its evidence and  
4 witnesses [are] in Puerto Rico."<sup>7</sup> This situation, according to  
5 plaintiff, contrasts with that of AALBORG, a multinational entity  
6 which does not bear the burden of proof in this action and which has  
7 a geographical advantage over plaintiff.<sup>8</sup> According to ANTILLES,  
8 acquiescing to defendant's request would be tantamount to rewarding  
9 a party for its consistent breach of contract and aggravate  
10 plaintiff's economic situation.

11 As previously noted, plaintiff's burden for disregarding its  
12 contractual obligation is a heavy one reserved only for "gravely  
13 difficult and inconvenient" situations. The complications and  
14 expenses attendant to the prosecution of a claim in a distant forum  
15 are foreseeable at the time a party consents to the contractual  
16 provision. "The cost of such litigation alone cannot be enough to  
17 meet the 'heavy burden' imposed upon the reneging party, who may now  
18 have second thoughts." In re Mercurio, 402 F.3d at 66. There must be  
19 evidence explaining how these litigating expenses "were not foreseen  
20 by the contracting parties when they entered into the Agreement." *Id.*  
21 In this case, as pointed out by defendant, ANTILLES negotiated a  
22 total of three provisions agreeing to submit disputes in connection

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24       <sup>7</sup> Opposition (docket No. 12) p. 11.

25       <sup>8</sup> AALBORG avers that its main offices, documentary evidence and  
26 witnesses are located either in Denmark or outside Puerto Rico.

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3 with the contract in England - initially to arbitration and  
4 subsequently to the English courts.5 The evidence presented in this case does not establish that  
6 ANTILLES would be effectively deprived of its day in court if forced  
7 to litigate its claims in England as it contracted to do with the  
8 defendant in the event of a conflict. Further, there is nothing in  
9 record indicative that plaintiff may not enjoy a fair trial in that  
10 jurisdiction.11 Accordingly, we find that in this particular case plaintiff is  
12 required to abide by the terms of a contractual obligation it freely  
13 and voluntarily undertook and assume the foreseeable consequences of  
14 its decision.15 **CONCLUSION**16 Based on the foregoing, defendant's Motion to Dismiss (docket  
17 No. 6) is **GRANTED**<sup>9</sup> and the complaint filed in this case is hereby  
18 **DISMISSED WITHOUT PREJUDICE.**

19 Judgment shall be entered accordingly.

20 IT IS SO ORDERED.

21 San Juan, Puerto Rico, this 29<sup>th</sup> day of November, 2007.22 \_\_\_\_\_  
23 S/Raymond L. Acosta  
RAYMOND L. ACOSTA  
24 \_\_\_\_\_  
25 United States District Judge26  
27 <sup>9</sup> See, Opposition (docket No. 12); Reply (docket No. 17); Sur  
Reply (docket No. 21); Motion Supplementing Record (docket No. 22)  
and Response (docket No. 23).